(18)

No. 90-1014

IN THE

Supreme Court Of The United States

October Term, 1990

ROBERT E. LEE, individually and as principal of the Nathan Bishop Middle School, et. al.,
Petitioners
v.

DANIEL WEISMAN, personally and as next friend of Deborah Weisman
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The National Legal Foundation is a public interest, non-profit law firm dedicated to the protection and preservation of religious liberties. The goal of the Foundation is to defend citizens' rights to pursue their faith free from unjust restraints and discrimination.

This commitment typically places the Foundation on the side of individual plaintiffs. Here, however, your *amicus* supports the legitimate and historically acceptable public acknowledgment of the religious heritage of this country embodied in the giving of an invocation and benediction at a public high school graduation ceremony. The Foundation opposes attempts to censor religion in public life and thereby convey government disapproval of religion.

The National Legal Foundation has participated as *amicus curiae* in several cases before both federal and state courts, including *Sands v. Morongo Unified School District*, No. S012721 (Sup. Ct. Cal. May 6, 1991), a case recently decided by the California Supreme Court concerning the same subject matter as this case. The Foundation has also directly litigated for religious liberty, including the U.S. Supreme Court case of *Board of Education of Westside Community Schools v. Mergens,* 110 S.Ct. 2356 (1990), addressing the constitutionality of the Equal Access Act of 1984, 20 U.S.C. section 4071 et seq.

Counsel of record for *Amicus Curiae* is Robert K. Skolrood. He is licensed to practice in Illinois, Oklahoma,

Virginia, the District of Columbia, the United States Supreme Court, as well as numerous U.S. Circuit Courts of Appeal and District Courts.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the Court in evaluating this case.

ISSUE PRESENTED

Does the inclusion of a traditional invocation and benediction in a public school graduation ceremony violate the First Amendment to the United States Constitution?

SUMMARY OF ARGUMENT

The opinion of the First Circuit Court of Appeals affirmed, without elaboration, the opinion of the District Court. *Weisman v. Lee*, 908 F.2d 1090 (1990). As such this brief will cite the District Court's opinion for details of the lower court's holding on the issue. That holding

imposes a *per se* banishment of references to a deity from public graduation ceremonies in the Providence, Rhode Island schools. This approach does not comport with the current fact-sensitive, context-oriented approach to First Amendment Establishment Clause cases employed by the United States Supreme Court, nor with a historical analysis of invocations and benedictions as practiced by the Framers of the First Amendment. While *Amicus* National Legal Foundation does not agree that the three-part *Lemon* test is the proper basis of analysis regarding the Establishment Clause, this brief will analyze the present case in light of current precedents which utilize the modified *Lemon* test.

Evaluation of the present case requires a consideration of the total context and setting within which the invocations and benedictions at issue occur, not merely a focus on the religious content of those prayers. Such a context-oriented inquiry shows that traditional invocations and benedictions have neither the purpose or effect of endorsing religion. This context-oriented endorsement inquiry is fully applicable in the school setting and does not require extirpation of religion from

speech at school functions. Students are capable of discerning the difference between endorsement and traditional ceremony.

The history of invocations and benedictions in American public ceremony and education, as part of the context in which the reasonable observer evaluates the purpose and effect of a challenged practice, further supports a finding of no impermissible purpose or effect of endorsing religion. History also suggests that invocations and benedictions are not the type of activity which the Framers of the First Amendment intended that provision to prohibit. Neither history nor law regarding "Separation of Church and State" require the removal of benign recognition of a deity or religious speech from public ceremonies.

The Court of Appeals' opinion, being based wholly on the opinion of the District Court, incorrectly applies federal law to effectively censor religious speech from this public ceremony. Such censorship is not neutrality, but hostility to religion forbidden by the First Amendment. The Court of Appeals should be reversed as more fully set forth below.

ARGUMENT

I

INCLUSION OF AN INVOCATION AND BENEDICTION IN A HIGH SCHOOL GRADUATION CEREMONY IS APPROPRIATE UNDER CURRENT FIRST AMENDMENT JURISPRUDENCE.

In evaluating the present case for a violation of the First Amendment,[1] the court below relied upon the three part test set forth by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *Weisman v. Lee,* 728 F.Supp. 68, 71 (D.RI. 1990). The United States Supreme Court recently reaffirmed its reliance on the *Lemon* test in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 592 (1989). Application of the *Lemon* test, as refined in the *County of Allegheny* case, shows that inclusion of an invocation and benediction in a public high school graduation ceremony is constitutional because it has a secular purpose, does not have the effect

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[1]The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

of endorsing religion and does not excessively entangle the public schools in religious affairs.

A. THE INVOCATION AND THE BENEDICTION IN THE GRADUATION CEREMONY DO NOT HAVE THE PRIMARY PURPOSE OR EFFECT OF ENDORSING RELIGION.

The first two prongs of the *Lemon* test examine the primary purpose and effect of the challenged action. In *County of Allegheny*, the United States Supreme Court, unifying its various holdings under the Establishment Clause, employed a clarification of these two prongs first articulated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), which has been termed the "endorsement test." *County of Allegheny,* 492 U.S. at 592-593 ("we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion"); *Id.* at 597 ("our present task is to determine whether the display of the creche and the menorah... has the effect of endorsing or disapproving religious beliefs.")

Under the "endorsement" clarification of Justice O'Connor, adopted by the Court in *County of Allegheny*:

> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.

Lynch, 465 U.S. at 690 (O'Connor, J. concurring). The test is, therefore, analogous to the concept of "facial" versus "as applied" challenges to statutes. See *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988).

PURPOSE

To determine whether or not a challenged practice has the impermissible purpose or effect of "endorsing religion" the Court has stated that "Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *County of Allegheny*, 492 U.S. at 596, citing *Lynch*, 465 U.S. at 694 (O'Connor, J. concurring). See also *County of Allegheny*, 492 U.S. at 625. (O'Connor, J. concurring in part, and concurring in the judgment). Thus, the Court in *County of Allegheny* carefully examined the "particular context" of the Christmas displays at issue, upholding display of the

menorah and forbidding display of the creche. *Id.* at 620-621.

Except in Judge Bownes' concurring opinion on appeal, *Weisman*, 908 F.2d at 1094-95, the Court below did not address the first prong of the *Lemon* test. *Weisman*, 728 F.Supp. at 71. The concurrence on appeal focused exclusively on the religious aspect of the invocation, invalidating it on that ground. Fully applying the endorsement test adopted by the United States Supreme Court to this case, however, it is clear that the school did not have as its actual purpose the endorsement of religion. There is no evidence that any school official sought or seeks to proselytize any student through the invocation or benediction. This is celebratory setting, not a pedagogical one. In fact, school officials have gone out of their way, through distribution of "Guidelines for Civic Occasions" to graduation speakers, to ensure that the school has no actual purpose of endorsing religion.

The court below failed to note Justice O'Connor's observation in *Lynch* that "government acknowledgments of religion [legislative prayers, opening court with prayer] serve, in the only ways reasonably possible in our culture,

the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in our society. For that reason and because of their history and ubiquity, these practices are not understood as conveying government approval of particular religious beliefs." *Lynch*, 465 U.S. at 693 (O'Connor, J. concurring). Justice O'Connor in no way suggested that elimination of reference to a deity was necessary to achieve this proper purpose.

EFFECT

Inclusion of an invocation or benediction in this graduation ceremony also does not "in fact [convey] a message of endorsement or disapproval" of religion and thereby have the impermissible effect of endorsing religion. *Lynch*, 465 U.S. at 490 (O'Connor, J. concurring). This second prong of the *Lemon* test was the sole focus of the court below. *Weisman*, 728 F.Supp. at 71. The opinion for the court below, however, failed to note that the primary effect was congruent with the secular purpose: The invocation and benedictions set a solemn

tone for the graduation ceremony and therefore do not have the primary effect of advancing religion.

This conclusion is supported by the fact-specific, context oriented inquiry required under the endorsement test. First, the invocation prayers did not occur in a "repetitive or pedagogical" context, and were not part of a program of "calculated indoctrination" but rather were a brief and peripheral part of a ceremonial function. *Grossberg v. Deusebio*, 380 F.Supp. 285, 288-89 (E.D. Va. 1974). In fact, high school graduation ceremonies for the Providence Schools do not even occur on school property. Attendance at the ceremony is voluntary and parents, friends, and other interested individuals are in attendance. The graduation ceremony occurs only once a year. By contrast, cases relied on by the plaintiffs and the court below involved daily state-mandated and state directed devotional exercises or teaching in a classroom setting without parental or community presence. *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer); *Abington v. Schempp*, 374 U.S. 203 (1963) (prayer and Bible reading); *Wallace v. Jaffree* 472 U.S. 578 (1985) (prayer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (state required teaching of creation

science). *Grand Rapids School Dist. v. Ball* 473 U.S. 373 (1985) (public school teachers in parochial school classrooms).

Second, a comparative analysis with other state actions, in the school and non-school context, which were held not to have the effect of endorsing religion, further supports a finding of no impermissible effect of endorsement. *Lynch*, 465 U.S. at 681-82. Thus, the objective observer would perceive no greater endorsement of religion by practice of invocations and benedictions than expenditure of public funds for textbooks for students attending parochial schools, *Board of Education v. Allen*, 392 U.S. 236 (1968); expenditure of public funds to transport students to parochial schools, *Everson v. Board of Education*, 330 U.S. 1 (1947); and, in the non-school context, expenditure of public funds for legislative chaplains, *Marsh v. Chambers*, 463 U.S. 783 (1983). See *Lynch*, 462 U.S. at 681-82 for additional examples.

Examining both what the school district "intended to communicate" in allowing the invocations and benedictions and "what message [was] actually conveyed,"

Lynch 465 U.S. at 490 (O'Connor, J. concurring), it is clear that the invocations have neither the purpose or effect of endorsing religion. The practice does not place the school board in the position of "appearing to take a position on questions of religious belief or . . . 'making adherence to a religion relevant in any way to a person's standing in the political community,'" *County of Allegheny*, 492 U.S. at 595, citing *Lynch* 465 U.S. at 687 (O'Connor, J concurring). Here, the use of invocations and benedictions within the context of a traditional celebratory setting of graduation indicates no intent or effect of endorsing religion just as display of religious paintings in the National Museum of Art does not indicate government endorsement of the content of the paintings. *Lynch* 465 U.S. at 692 (O'Connor, J. concurring).

B. THE ENDORSEMENT ANALYSIS IS FULLY APPLICABLE IN THE PUBLIC SCHOOL SETTING.

Plaintiffs and the court below fail to apply the controlling "endorsement" inquiry in their analysis. Focusing narrowly on the premise that the challenged

invocations and benedictions mention a deity and are therefore religious, the plaintiffs and the court proceed to argue that absolutely no permissible purpose or effect is possible in the school setting. *Weisman* 728 F.Supp. at 72.

First, the contention that public bodies must always use non-religious or the least religious means to accomplish secular goals is clearly erroneous. The United States Supreme Court has specifically rejected the notion that the government must employ the "least-religious-means" to achieve proper secular goals. *County of Allegheny*, 492 U.S. at 676 n.12 (Kennedy, J. dissenting); *Id.*, 492 U.S. at 636 (O'Connor, J. concurring in part, and concurring in the judgment). As Justice O'Connor stated in rejecting this requirement, "My conclusion [upholding constitutionality of displaying the menorah] does not depend on whether or not the city had 'a more secular alternative symbol' of Chanukah... In my view, Justice Blackmun's new rule, *ante*, at 492 U.S. 618, that an inference of endorsement arises every time government uses a symbol with religious meaning if a 'more secular alternative' is available, is too blunt an instrument for Establishment Clause analysis, which depends on

sensitivity to the context and circumstances presented by each case." *Id.*, 492 U.S. at 636.

As stated by the Court in *Lynch*, focusing "exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.*, 465 U.S. at 680. The Court in *Lynch* termed the District Court's inference of improper purposes solely from the religious nature of the creche "clearly erroneous." *Lynch*, 465 U.S. at 681, and emphatically rejected the dissent's parallel argument:

> Justice Brennan argues that the city's objectives could have been achieved without including the creche in the display....True or not, that is irrelevant. The question is whether the display of the creche violates the Establishment Clause.

Id., 465 U.S. at 681 n.7. Justice O'Connor has gone so far as to assert that use of an available secular symbol of Chanukah might be viewed as mocking that observance and that in fact:

> [T]he more *religious* alternative may, depending on the circumstance, convey a message that is least likely to implicate Establishment Clause concerns.

County of Allegheny, 492 U.S. at 636-637 (O'Connor, J. concurring in part and concurring in the judgment) (emphasis in the original).

The application to the present case is readily apparent. Use of a prayer referring to a deity to invoke or conclude a graduation ceremony does not in and of itself render the ceremony unconstitutional. "Focus on the specific practice in question in its particular physical setting and context," is required to determine whether endorsement has occurred. *County of Allegheny*, 492 U.S. at 637 (O'Connor, J. concurring in part and concurring in the judgment). Given the historical use of prayers in invoking public ceremonies, including graduations (See discussion in Part II, p. 29 below) exclusion of the prayers could, in fact, be interpreted as disapproval of religion, implying that religious discourse somehow holds a second-rate status in the public arena. Such a position calls to mind the admonition of Justice Brennan's concurrence in *McDaniel v. Paty*, 435 U.S. 618, 641 (1978), "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American

ideals and therefore subject to unique disabilities." *Id.*, 435 U.S. at 618. Or as Justice O'Connor stated in *County of Allegheny*, the Court "has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion." *Id.*, 492 U.S. at 623. Government need not paganize or secularize all public speech.[2] Context is sufficient to remove any implication of endorsement.

The "endorsement test" for assessing the purpose and effect prongs of the *Lemon* test, as set forth in *County of Allegheny*, is fully applicable to the public school setting.

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[2]Because religious content alone does not necessarily indicate endorsement, it is unnecessary for courts to review "the content of prayers to judicially approve what are acceptable invocations to a deity." *Weisman*, 728 F.Supp. at 74.

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Marsh v. Chambers, 463 U.S. 783, 794-5 (1983). Under the endorsement inquiry, it is not the religious content of the prayer that is the focus of the inquiry, but rather the total context within which the prayer occurs. Therefore, *Marsh* may be harmonized with the endorsement inquiry, despite no reference to *Lemon*'s 3 prong test. See *County of Allegheny* 492 U.S. at 596 n.46.

This is clearly demonstrated by the repeated citations to school-based cases in the Court's opinion setting forth the endorsement inquiry. *County of Allegheny*, 492 U.S. at 592-597.

The Court in *Lynch* vividly demonstrated the application of the endorsement inquiry in the context of the public school by reference to its decisions in *Stone v. Graham*, 449 U.S. 39 (1980) (*Per curiam*) and *Abington School District v. Schempp*, 374 U.S. 203 (1963). *Lynch*, 465 U.S. at 679. In *Stone*, the Court invalidated a state statute requiring the posting of the Ten Commandments on classroom walls because they were posted purely as a religious admonition. The Court stated, however, that though the Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths," (see discussion above on use of religious means), the Commandments could have been "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Stone*, 449 U.S. at 41-42. Similarly, the Court in *Abington*, after striking down required devotional Bible readings "noted that nothing in

the Court's holding was intended to 'indicat[e] that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment.'" *Lynch*, 465 U.S. at 679-80, citing *Abington*, 374 U.S. at 225.

As the discussion of *Stone* and *Abington* in *Lynch* indicates, it is not the presence of religion or a reference to deity in a public school that is forbidden, because the Bible, a religious document replete with references to God, could be utilized in the classroom in proper context. The key focus is whether the particular setting and context in which the religious activity at issue is employed has the purpose or effect of communicating endorsement. All of the United States Supreme Court cases cited by the court below involve daily state-mandated and directed devotional exercises or teaching in a closed classroom setting. *Engel, supra.* (state required prayer); *Abington, supra.* (state directed Bible reading); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (state required prayer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (state required teaching of creation science). *Grand Rapids School dist. v. Ball*, Supra.

(public teacher instructing in parochial classrooms). As the Court noted in *Edwards*, the daily classroom setting is particularly susceptible to conveying a message of endorsement because, "The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.*, 482 U.S. at 584. But see *Stone*, 449 U.S. at 42, *Abington*, 374 U.S. at 225 and the discussion above. See also *McCollum v. Board of Education*, 33 U.S. 203, 236 (1948) (Jackson, J. concurring). ("Certainly a course on English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren."); *Crockett v. Sorenson*, 568 F.Supp. 1422 (W.D. Va 1983); and *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980) for uses of religion and references to a deity in a classroom setting. Absolutely none of the cases of the United States Supreme Court cited by the court below stands for the proposition that public schools must be "*religion-free*" *zones*. Rather, each case plaintiffs rely on has examined the unique daily devotional exercise or teaching in a

classroom setting to find a purpose or effect of endorsement under the facts of that case.

Many lower federal courts which have dealt with prayer at school functions, such as the court in *Jager v. Douglas County School Dist.*, 862 F.2d 824 (11th Cir. 1989) cert. den., 109 S.Ct. 2431 (prayer before football games) have utterly failed to apply the careful fact specific inquiry required under the endorsement analysis. Instead, they have adopted a *per se* banishment of religion from school grounds which does violence to the careful analysis established in *County of Allegheny*. The *per se* analysis employed by the District Court in this case, banishing all reference to a deity from the ceremony, communicates a purpose and effect of disapproving religion in public life. By contrast, the U.S. Supreme Court, as noted earlier, "has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion." *County of Allegheny*, 492 U.S. at 623 (O'Connor, J. concurring).

On the facts of this case, the lower court was wrong in concluding that inclusion of a traditional invocation or

benediction had the effect of endorsing religion. The court failed to properly examine the "particular context" of the graduation ceremony but rather employed the blunt, simplistic, *per se* approach to this case advocated by plaintiffs below and courts such as the court in *Jager*.

C. PUBLIC SCHOOL STUDENTS ARE MATURE ENOUGH TO DISTINGUISH IMPERMISSIBLE ENDORSEMENT FROM TRADITIONAL CEREMONY

A fundamental misconception occurs if this matter is viewed as involving the type of mandatory classroom prayer or devotional exercises which have been held unconstitutional by the U.S. Supreme Court. In such cases, the Court has been properly concerned with truly impressionable children, as young as kindergarten or other primary grades, undergoing clearly religious devotional exercises on a daily basis for year after year of school attendance. At issue here, however, are brief, 30-60 second traditional invocations and benedictions in middle school and high school graduation ceremonies. It is thus not credible or persuasive to simply apply the same concerns regarding impressionable children to such a

ceremonial context involving young adults. The court below fails to recognize the maturity level of modern students. *Weisman*, 728 F.Supp. at 72.

Society itself, as exemplified by common law or statute, certainly does not view or treat young adults as so inherently "impressionable" as to be remotely capable of "indoctrination" by a thirty (30) to sixty (60) second invocation or benediction in the context of ceremonial pomp and circumstance. When attending the ceremony, many of the graduates are either eighteen (18) years of age, or will turn eighteen (18) shortly. Many such young adults will soon be college freshmen.

By way of example, all eighteen (18) year old young adults from the Providence schools are deemed mature and responsible enough to: vote (U.S. Const., amend XXVI, R.I. Gen.Laws Section 17-1-3); serve in the armed forces (10 U.S.C. 505); operate a motor vehicle (R.I. Gen.Laws Section 30-10-3); marry (R.I. Gen. Laws Section 15-2-11); consent to certain medical care for themselves and their children (R.I. Gen. Laws Section 23-4.6-1); and, in certain cases, to consent to an abortion,

perhaps one of life's most difficult and complex choices (RI Gen.Laws Section 23 - 4.7-6).

Lower federal courts, such as the court in *Doe v. Aldine Independent School District,* 563 F.Supp. 883 (S.D. Tex. 1982), and the court below have cast students as hopelessly impressionable. The court in *Doe* manufactured a nonexistent Supreme Court quotation, supposedly found in *Roemer v. Board of Public Works* 426 U.S. 736 (1976), at pages 750 and 754 to "support" this proposition. See *Doe*, 563 F.Supp. at 887.

All the Supreme Court decisions actually citing impressionability concerns involved a school context of daily, state mandated and directed devotional exercises in a closed classroom with students from first grade upward. Where, as here, the context is not daily pedagogy and only older students, in fact graduates, are involved, the Supreme Court and other federal courts have recognized that students are mature enough to make sponsorship distinctions. *Tinker v. Des Moines Independent School Dist.,* 393 U.S. 503 (1969) (no danger that high school students' symbolic speech implied endorsement); *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 556 (1986)

(Powell, J. dissenting) (four years difference between high schoolers and college age students irrelevant); *Board of Education v. Pico,* 457 U.S. 853 (1982) (existence of controversial books in the library does not constitute school endorsement of content). *Mergens v. Board of Education of Westside Community Schools,* 110 S.Ct. 2356, 2372 (1990) (proposition that schools do not endorse everything they fail to censor is not complicated).

The present case parallels the challenge raised and rejected in *Evans v. Selma Union High School Dist. of Fresno County,* 222 P. 801 (Cal. 1924) (*Per Curiam)* where the Supreme Court of California upheld the purchase of King James Bibles for a public high school library. Such a purchase surely "benefited" Protestant Christianity by making its primary sacred text readily available to students, but such "benefit" was merely an incident of the primary public purpose of making a literary classic accessible to students. Just as the "mere act of purchasing a book to be added to the school library does not carry with it any implication of the adoption of the theory or dogma contained therein, or any approval of the book itself," *Id.* at 803, inclusion of an invocation in graduation

exercises for the legitimate purpose of solemnizing the occasion does not imply that the school endorses the message therein or approves of the prayer or its speaker.

The graduating students of the Providence school system are capable of discerning the difference between impermissible endorsement and traditional celebration of an important civic event. The fears of indoctrination expressed by the plaintiffs and the court below have no basis in fact or law.

D. INCLUSION OF AN INVOCATION AND BENEDICTION IN THE GRADUATION CEREMONY DOES NOT EXCESSIVELY ENTANGLE THE SCHOOL IN RELIGION.

Except in Judge Bownes' concurring opinion on appeal, *Weisman*, 908 F.2d at 1095, the Court below did not address this prong of the *Lemon* test. *Weisman*, 728 F.Supp. at 71. The concurring judge's conclusive remarks regarding excessive entanglement in the present case failed to recognize the fact that this court has only found excessive entanglement where there is an ongoing relationship between government and religion as noted in

Lemon, below. Complete separation of religion from the state is impossible. *Lemon*, 403 U.S. at 614. "Some relationship between government and religious organizations is inevitable." *Id.* Only "excessive" entanglement is prohibited. *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970); *Lemon* 403 U.S. at 615. To be excessive, alleged entanglements must be in the nature of a regular relationship with "comprehensive, discriminating, and continuing state surveillance" of the challenged activity. *Lemon*, 403 U.S. at 619.

The facts of this case show no "excessive" entanglement. The graduation ceremony occurs once a year. Remuneration from state funds is for the purpose of the ceremony generally, not the invocation or benediction particularly and would be spent regardless of their inclusion. The school does not dictate the content of the invocation or benediction. The school does provide the booklet "Guidelines for Civic Occasions" to prospective speakers. There is no pre-approval procedure to which speakers must submit. The fact that school employees choose the speaker is irrelevant. A graduation ceremony is not a random event that occurs without planning.

Choice does not equal *per se* entanglement, just as President George Bush's choice of Billy Graham to deliver a prayer at his inauguration does not equal entanglement.

Plaintiffs argued below that the invocations are "divisive" and therefore entangle the state in religion. While divisiveness was raised as an issue in *Lemon*, the United States Supreme Court "has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct." *Lynch* 465 U.S. at 684. The Court had specifically limited this inquiry to cases involving state aid to parochial schools. *Mueller v. Allen*, 463 U.S. 388, 404 n. 11, and noted that this inquiry was subject to abuse because litigants could "by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement." *Lynch* 465 U.S. at 684-85. Justice O'Connor's concurrence in *Lynch* specifically rejected the divisiveness element. *Id.*, 465 U.S. at 689. It would be unjust to allow the mere filing of a lawsuit by plaintiffs to be the predicate upon which a claim of unconstitutionality is founded.

II

THE "HISTORY AND UBIQUITY" OF RELIGIOUS INVOCATIONS AND BENEDICTIONS IN AMERICAN PUBLIC CEREMONY, INCLUDING GRADUATION CEREMONIES, SUPPORTS THEIR INCLUSION UNDER THE FACTS OF THIS CASE.

In her concurrence in *County of Allegheny*, Justice O'Connor noted that the "history and ubiquity" of a practice is a significant factor in determining the primary effect of a challenged tradition because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Id.*, 492 U.S. at 630, (O'Connor, J. concurring in part and concurring in the judgment), citing *Lynch*, 465 U.S. at 693, (O'Connor, J. concurring). Of course, "no one acquires a vested or protected right in violation of the Constitution by long use," *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970), but such long use does indicate that "such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs." *County of Allegheny*, 492 U.S. at 625 (O'Connor, J. concurring in part and concurring the judgment).

Historical context is not only a consideration in the endorsement analysis; it provides direct evidence of the intentions of the Framers of the First Amendment. As Justice Oliver Wendell Holmes, Jr. observed, "a page of history is worth a volume of logic." *New York Trust Comp. v. Eisner*, 256 U.S. 345, 349 (1921). Examination of history also addresses the concern that cases implicating cherished First Amendment religious freedoms not be decided in such a way as to "undermine the ultimate constitutional objective as illuminated by history." *Walz*, 397 U.S. at 671. Historical research establishes that public prayers at civil ceremonies have been a fixture of America's life and heritage since the Nation's inception and are not the type of activity which the Framers intended the Establishment Clause to forbid.

A. PUBLIC INVOCATIONS AND PRAYERS HAVE BEEN A FIXTURE OF AMERICAN CIVIL LIFE AND CEREMONY SINCE THE INCEPTION OF THE NATION. THE FRAMERS OF THE ESTABLISHMENT CLAUSE ACTIVELY PARTICIPATED IN PUBLIC INVOCATIONS AND PRAYERS.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court stated:

> [H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress - their actions reveal their intent.

Id. at 790. Historical evidence clearly establishes that the Framers of the First Amendment never intended the Establishment Clause to forbid public invocations or prayers at civil ceremonies.

The Declaration of Independence, the founding document of the nation, begins with an appeal to "the Laws of Nature and of Nature's God." Its benediction proclaims a "firm reliance on the Protection of Divine Providence." That seminal document contains a prayer "to the Supreme Judge of the world for the rectitude of our intentions." The fate of the Republic from the start was linked to a public petition to God by the unanimous agreement of the Signers. This appeal transcended their religious differences, gaining the approval of Deist and Christian supplicant alike. The religious language in the Declaration was not simply a meaningless gesture.

In his concurrence with the First Circuit Court of Appeals, Judge Bownes takes *Amicus* National Legal

Foundation to task for advancing this view of the Declaration: "*Amicus Curie* National Legal Foundation would have us read the religious imagery of the Declaration into the Constitution. There is not justification for such a reading. The omission of a reference to a Deity in the Constitution was not inadvertent; nor did it remain unnoticed." *Weisman*, 908 F.2d at 1091, n. 5.

John Quincy Adams took a very different view. In his "*Discourse on the Jubilee of the Constitution*" delivered on April 30, 1839, Adams spoke at considerable length on the theme that the Constitution was part and parcel of Declaration. He described the Constitution as "the complement to the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and forming with it, one entire system of national government." J. Q. Adams, *The Jubilee of the Constitution: A Discourse Delivered at the Request of The New York Historical Society*, The New York Historical Society, 4 (1839). Those principles, according to Adams, were based on "the laws of nature and of nature's God,

and of course presupposes the existence of a God, the moral ruler the universe..." *Id.* at 5. This connection between the Declaration and the Constitution has also been recognized in U.S. government publications. A pamphlet produced by the Division of Publications of the National Park Service under the Department of the Interior quotes John Quincy Adams on this very point. The pamphlet, entitled *The Framing of the Federal Constitution*, states: "To many of the Founding Fathers the Federal Constitution was the culmination of the great events inaugurated by the American Revolution. As John Quincy Adams observed years later: 'The Declaration of Independence and the Constitution of the United States are parts of one consistent whole, founded upon the same theory of government.'" Richard Morris, *The Framing of the Federal Constitution*, 20 (1986).

Congress has a permanent record of opening with prayer. Congress is at once our most public and influential institution. The second day the Continental Congress met, September 6, 1774, Mr. Cushing of Massachusetts moved the proceedings be opened with prayer. Samuel Adams spoke in support of the motion,

saying he was "no bigot." Adams stated, he could "hear a prayer from a man of piety and virtue, who is at the same time a friend of his country." J. Adams, 1 *Letters of John Adams* 23 (C. Adams, ed. 1841). The religious differences thus overcome, the Rev. Jacob Duche, an Episcopalian, was called upon to lead the prayers. John Adams explained the scene:

> You must remember, this was the next morning after we heard the horrible rumor of the cannonade of Boston. I never saw a greater effect on an audience.... Mr. Duche .... struck out into an extemporary prayer, with such fervor, such ardor, such earnestness and pathos, and in language so elegant and sublime, for America, for the Congress, for the province of Massachusetts Bay, and especially the town of Boston.

Id. p. 24.[3]

Duche served as Chaplain for three years. On occasion, Congress met at his church "to attend divine service." E. Humphrey, *Nationalism and Religion* 412 (1965), quoting, 2 Journals of Congress 81, 87, 192. As

[3]James Hosmer, biographer of Samuel Adams, notes that this invocation was not divisive, despite the widely scattered religious opinions of the members present, but rather united the body "and a spirit of harmony, quite new and beyond measure salutary, came to prevail." J. Hosmer, *Samuel Adams*, 284-85 (1898).

chaplain in 1776, Rev. Duche led Congress in the following prayer:

> O Lord, our heavenly Father...look down in mercy, we beseech thee, on these our American States, who have fled to thee from the rod of the oppressor, and thrown themselves on thy gracious protection, desiring to be henceforth dependent only on thee. To thee do they now look up for that countenance and support which thou alone canst give: take them, therefore, heavenly Father, under thy nurturing care; give them wisdom in council, and valor in the field; defeat the malicious designs of our cruel adversaries; convince them of the unrighteousness of their cause, and if they still persist in their sanguinary purposes, oh! let the voice of thine own unerring justice, sounding in their hearts, constrain them to drop the weapons of war from their unnerved hands in the day of battle.

L. Sabine, 1 *Biographical Sketches of Loyalists of the American Revolution* 389 (reprint ed. 1979)

The situation was no different after the adoption of the Constitution. In *Marsh*, the Court noted that just three days after the First Congress under the Constitution authorized appointment of paid chaplains to open sessions of Congress with prayers, the same Congress reached final agreement on the language of the First Amendment. *Marsh*, 463 U.S. at 788. The Framers of the

First Amendment saw no conflict between the proscriptions of that Amendment and the daily observance of prayer at the very seat of government.

This understanding was not limited to the legislative branch. George Washington, upon the occasion of his first inauguration, took opportunity to acknowledge America's religious heritage. Standing on the second-floor balcony of Federal Hall, then the seat of the United States government, he stated:

> [I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government.... In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own.... No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency....

G. Washington, *First Inaugural Address,* in 1 *Messages and Papers of the Presidents* 44 (J. Richardson ed. 1897).

Responding to President Washington's address, the Senate stated:

> [W]e are with you unavoidably led to acknowledge and adore the Great Arbiter of the Universe, by whom empires rise and fall. A review of the many signal instances of divine interposition in favor of this country claims our most pious gratitude....

Address of the Senate to George Washington, President of the United States, May 7, 1789, in 1 *Messages and Papers*, supra, at 46-7.

The Senators closed their address by commending President Washington "to the protection of Almighty God..." *Id.* at 47.

It was the First Congress which urged President Washington;

> to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness;

G. Washington: *A National Thanksgiving,* in *Messages and Papers,* 1:56.

As the Supreme Court has noted, this resolution was passed on the same day that final agreement was reached on the language of the Bill of Rights, including the First Amendment. *Marsh*, 463 U.S. at 788 n.9; *Lynch v. Donnelly*, 465 U.S. at 675 n.2 (1984). President Washington set aside November 26, 1789:

> to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war...for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed...
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed....

Messages and Papers, 1:56

This tradition, carried out by our presidents and fixed by the official Thanksgiving holiday, is the clearest example of the Framers of the Establishment Clause actively participating in public invocations and prayers. The United States Supreme Court has emphasized that the Congress which drafted the First Amendment, "was a Congress whose constitutional decisions have always been regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers v. United States*, 272 U.S. 52, 174-5 (1926), cited in *Lynch*, 465 U.S. at, 674. Clearly, Congress saw no conflict between public invocations and prayers and the First Amendment.

Use of public invocations and prayers is by no means limited to Congressional prayer, inaugural addresses, and Thanksgiving proclamations. Each morning, the Federal and State Courts across the nation open with time-honored petitions such as "God save the United States and this honorable Court," which is used in the United States Supreme Court. Every foreign individual who seeks to become a United States citizen concludes his oath of allegiance with the benediction "so

help me God." Oath of Allegiance, 8 C.F.R. 337.1 (1989). These practices continue unabated by any charge of "establishment of religion."

B. PUBLIC SCHOOLING IN AMERICA HAS ITS ROOTS IN RELIGION. CEREMONIAL PRAYER HAS BEEN A CONSISTENT FEATURE OF AMERICAN EDUCATION.

The religious roots of public education in America date back to the founding of the colonies.

> Because of the religious persuasions of the colonists and their predominantly Protestant beliefs, schools were established from the beginning, the first being required in an Act of 1642.

James Bowen, 3 *A History of Western Education* 268 (1981).

In 1647 the Massachusetts Bay colony adopted the famous "Old Deluder Satan Act" establishing public schools and requiring towns to appoint and pay teachers. The primary object of the Act was to teach literacy so citizens would know the Scriptures. *Id.* at 268. The *New England Primer* followed suit with such didactic rhymes as:

> A. In Adam's fall,
> We sinned all.
>
> B. Thy life to mend
> This Book [*i.e.* Bible] attend.

Id., p. 270.

The American Revolution clearly did not extirpate the religious content of these materials. Catechisms such as "Spiritual Milk for American Babes," continued to be employed in public schools well into the 19th century. *Id.*, p. 271. Educational historian R. Freeman Butts, chronicles the development of public schools in the New England, Middle, and Southern colonies. R. Butts, *A History of Education in American Culture* (1953) at 100-108. See also DuPuy, *Religion, Graduation, and the First Amendment: A Threat or a Shadow?* 35 Drake L. Rev. 323, 358-364 (1985-86). Specifically mentioned by Butts are the Massachusetts Acts mentioned above and the Pennsylvania state constitution of 1776 which stated:

> A school or schools shall be established in every county by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct youth at low prices; and all useful learning shall be duly encouraged and promoted in one or more universities.

Butts, *History of Education*, at 108. Public schools have been a fact of the American scene from the beginning.[4]

Clearly, public education existed contemporaneous with the drafting of the First Amendment just as the use of legislative chaplains upheld in *Marsh*. While the Founding Fathers did not specifically make provision for graduation invocations, as they did for legislative prayers, it was not because public schools did not exist, but because authority over education was reserved to the states. As noted by the court below, "There is no factual basis for an historical argument that the first amendment was intended by the drafters to isolate religion from education." *Weisman* 728 F.Supp. at 73, n.8.

In the federally administered territories and the District of Columbia, the First Congress did have authority regarding education. Congress itself recognized the necessary link between religion and education in the famous wording of the Northwest Ordinance of 1787:

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[4]The court below is, therefore, correct in noting that "There is no factual basis for an historical argument that the First Amendment was intended by the drafters to isolate religion from education." *Weisman* 728 F.Supp. at 73, n.8. The court is incorrect in its statement that 1840 was the beginning of public education, as is clear by the discussion above. The first public schools were religiously motivated and insured Biblical literacy. That fact made them no less public, however.

> Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

This law, adopted before ratification of the First Amendment and reaffirmed by Congress after the First Amendment was adopted, was the foundation of public education in the Old Northwest. Thomas Jefferson, often considered the strictest of separationists, was the first president of the school board in the District of Columbia in which the Bible and the Watts Hymnal were used as the primary texts. J. Wilson, *Public Schools of Washington*, 1 Records of the Columbia Historical Society 4 (1897).

That the Founding Fathers passed no law requiring graduation invocations shows their respect for federalism. That the First Congress, First Court, and First Executive engaged in invocations and saw no conflict between religion and education is ample proof that our Founding Fathers saw no inconsistency between the practice of invocations in public ceremonies and the Constitution which framed our government.

The long standing practice of invocations and benedictions in the educational context is illustrated by the practice of the University of Georgia, the first public university, chartered by the legislature of that state by an Act of 1785.

> "[A] free government...can only be happy where the public principles and opinions are properly directed and their manners regulated. This is an influence beyond the sketch of laws and punishments, and can be claimed only by religion and education. It should therefore be among the first objects of those who wish well to the national prosperity, to encourage and support the principles of religion and morality...that by instruction they should be moulded to the love of virtue and good order."

A Digest of the Laws of the State of Georgia 299 (R. Watkins & G. Watkins eds., 1800 & photo reprint 1981).

Studies began in 1801 and the first graduation ceremony took place May 31, 1804. The commencement "Programme" included a "sacred music" prelude, an invocation by the "Rev. Mr. Marshall" and a "concluding prayer, by Rev. Hope Hull." A.L. Hull, *A Historical Sketch of the University of Georgia,* 17-19 (1894); *Augusta* [Ga] *Chronicle*, June 23, 1804. Georgia historian E. Merton Coulter adds, "there was always a great flood of

declamations, and, of course, the commencement sermon." E. Coulter, *College Life in the Old South*, 135 (1951). This tradition, at least with respect to the invocation, has continued unabated, the 1988 invocation being the prayer "For Our Country" from the *Book of Common Prayer,* 820 (1789, reprint ed. 1979) delivered by a local pastor:[5]

Those who framed the First Amendment to secure religious liberty actively participated in invocations and benedictions in the context of civil ceremonies. Graduation ceremonies since the founding of the nation have opened and closed with religious invocations and benedictions. If utilized in the "endorsement" analysis

[5]The University of Georgia example is used to show the longevity of the practice in American education graduation ceremonies. Of course, graduation ceremonies predate the founding of the country and have their roots in religious clerical processions. K. Sheard, *Academic Heraldry in America* 69 (1962).

The program employed by the university is relevant in that it is typical of the format used in the Providence schools, except for the sermon. The only difference is the age of the students, yet courts have specifically acknowledged the ability of high school students to distinguish improper sponsorship of religion and neutral acknowledgment or accommodation of religion. *Mergens v. Board of Education of Westside Community Schools,* 110 S.Ct. 2356, 2372 (1990); *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 556 (Powell, J., dissenting) (few years of difference in age between high schoolers and college age students irrelevant); *Tinker v. Des Moines Independent School Dist.,* 393 U.S. 503 (1969), and the discussion in Part I Section C, p. 22 above.

presently employed by the United States Supreme Court, the "history and ubiquity" of graduation prayers, as part of the context in which the practice must be evaluated, clearly supports a finding of no unconstitutional establishment of religion. If viewed as an independent assessment of the meaning and scope of the First Amendment, it is clear that invocations at civil ceremonies, including graduations, was not the type of activity the First Amendment was designed to prohibit. Any other interpretation "sweeps away the practices of the Framers themselves [and] is implausible as well as inappropriate. We should not treat them [the Framers] as hypocrites about their own handiwork." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 140 (7th Cir. 1987) (Easterbrook, J., dissenting).

IV
CONCLUSION

Whether viewed under the "endorsement" test employed by the current United States Supreme Court, or the practice of the Framers of the First Amendment as revealed in history, the inclusion of an invocation and

benediction in a public high school graduation ceremony is a constitutional practice. It is no different from "Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths - these and all other references to the Almighty that run through our laws, *our public rituals, our ceremonies...*" which have never been held as "flouting the First Amendment." *Zorach v. Clauson,* 343 U.S. 306, 312-313 (1952) (emphasis added). Certainly where, as here, the prayers at issue do not:

A. take place in the pedagogical environment of the classroom or

B. coerce any religious exercise or belief,

they must be presumed to pass muster under the Establishment Clause.

This Court should emphatically reject the simplistic *per se* approach to religion in public ceremony advocated by plaintiffs and utilized by the court below. Such censorship of religious speech from public life does not constitute neutrality toward religion, *but hostility of the worst sort.* It relegates religion to a second class status in the political

community. As Justice Goldberg warned in his concurring opinion in *Abington v. Schempp*:

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Abington, 374 U.S. at 306 (Goldberg, J. concurring).

The present policy of the Providence public schools regarding graduation invocations and benedictions has no ulterior purpose or impermissible effect that render it unconstitutional. Rather, the policy recognizes, in the words of writer and social critic Richard John Neuhaus, that:

> [O]ur public life should reflect the vibrant pluralism that is America. That pluralism includes religion and religious symbols in public....A public square that is stripped of all signs of our differences may offend nobody, but it will also be a public square in which nobody feels at home. A naked public square or a homogenized public square is a profoundly undemocratic public square.

R. Neuhaus, *Religion in Public Places*, Washington Times, May 2, 1986, at 3D.

Roger Williams, the founder of Rhode Island and a student of Sir Edward Coke, was the prime mover in that state's historic commitment to religious freedom. The late Harvard law professor Mark Dewolfe Howe in his book, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (University of Chicago Press 1965), used Roger Williams' church/state metaphor in the title of his book. He quotes Williams on the book's title page:

> When they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day.

Howe goes on to explain that it was Williams' metaphor of separation that was the prevailing view of church/state relations at the time of the drafting of the First Amendment:

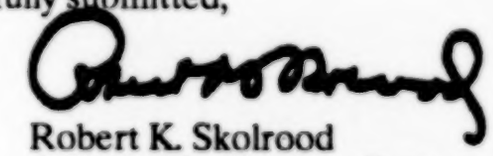
> Seen in this context of theory, the First Amendment's religious clauses seem as consistent with the attitude toward religion reflected in the figure of speech used by Roger Williams as with that discovered by the Court in the same figure when it came from the pen of Thomas Jefferson... I think

> it likely that the amendment's prohibitions at the time of their promulgation were generally understood to be more the expression of Roger Williams' philosophy than that of Jefferson's. This heterodox supposition I base upon my belief that, by and large, American opinion in 1790 accepted the view that religious truth is identifiable and beneficent. It was, in large part, because that was the prevailing view that it seemed peculiarly appropriate to safeguard that truth from the rough and corrupting hand of government. I take it, in other words, that the predominant concern at the time when the First Amendment was adopted was not the Jeffersonian fear that if it were not enacted the federal government would aid religion and thus advance the interest of impious clerks but rather the evangelical hope that private conscience and autonomous churches, working together and in freedom, would extend the rule of truth.

Id. at 18, 19.

Nothing in the history or jurisprudence of this nation suggests that public ceremonies should be sanitized of all religion or references to a deity. The court below should be REVERSED.

Respectfully submitted,



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